89-1104

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

ALCAN FOIL PRODUCTS DIVISION OF
ALCAN ALUMINUM CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

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QUESTIONS PRESENTED

In 1982, the State of Kentucky, acting through the Jefferson County Air Pollution Control District, submitted a proposed revision to its Standard Implementation Plan that would permit regulation of air pollution by means of a generic bubble. That proposal has not been approved or disapproved by the U.S. EPA. After Alcan Aluminum Corporation purchased the facility that is the subject of this litigation, it learned of the EPA's failure to act on the proposed revision. Since some form of bubble was necessary to make the plant economically viable, Alcan sought to work out a source specific revision to the Jefferson County Plan that incorporated a bubble. Instead of approving or rejecting this proposed revision in the required four month period, the EPA filed this lawsuit seeking penalties for the failure of Alcan to comply with the original Plan. The questions presented are:

1. Where the EPA has failed to act on a revision to a state plan within four months, as required by the Clean Air Act, may the government bring an action for civil penalties against a company that is in compliance with the revised plan?

2. Whether the decision below undermines the ability of the states to make ongoing policy choices as to air pollution control measures, and creates disincentives for even-handed administration of the Act.

3. Whether the decision below is contrary to the language and intent of Congress and the decisions of this Court and other circuit courts.

RULE 29.1 STATEMENT

Petitioner is a wholly owned subsidiary of Alcan Aluminum Limited, a Canadian corporation with hundreds of subsidiaries and affiliates worldwide. Petitioner is an Ohio corporation whose non-wholly owned subsidiaries and affiliates are listed below:

LIST OF SUBSIDIARIES AND AFFILIATES

Alcan Toyo America, Inc.

Advanced Forming Technologies

Alanx Products Company

Alcan Sumitomo Electric, Inc.

Lanxide Development Company

Lanxide Technology Company

Logan Aluminum, Inc.

Ramtron International Corporation

Superconductor Technologies, Inc.

The Aluminum Railcar Company

Polyfiltronics N.A., Inc.

Sytec Enclosures Company

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No. _____

IN THE

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ALCAN FOIL PRODUCTS DIVISION OF
ALCAN ALUMINUM CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner Alcan Aluminum Corporation prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 1889 F.2d 1513; 1989 U.S. App. LEXIS 17373, and is reprinted in the Appendix to this petition at A1.

JURISDICTION

The decision below was rendered on November 21, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

This case involves a Clean Air Act enforcement action by the Environmental Protection Agency (EPA) against Alcan Foil Products, Division of Alcan Aluminum Corporation ("Alcan"). Under the Act, EPA is required to approve or disapprove within four months revisions to State Implementation Plans (SIPs). 42 U.S.C. sec. 7410(a) (2) (3) (1982). The principal issue in this case is whether EPA's failure to so act prevents it from enforcing the prior state plan.

STATEMENT OF THE CASE

The questions presented in this case raise fundamental issues concerning the appropriate division of authority between the federal government and the states in the establishment and implementation of the State Implementation Plans ("SIP") under the Clean Air Act ("Act"). The Act requires the EPA to act promptly, within four months, either to approve or disapprove a SIP revision. The EPA's refusal to act in a timely manner on a SIP revision by a state and instead attempt to enforce the old SIP, unlawfully interferes with a state's right to select the regulatory alternative that it will use to attain federal standards. In addition, this tactic by the EPA subjects many companies which are making a good faith effort to comply with the Act to the potential of large fines and large and unnecessary litigation expenses. Because of this infringement of state prerogatives and the "contumacious" nature of the EPA conduct, the Fifth Circuit held in a similar case that the EPA may not collect penalties under the old SIP. *American Cyanamid Co. v. EPA*, 810 F.2d 493 (5th Cir. 1987).

Expressly disagreeing with the Fifth Circuit's approach, in *General Motors Corporation v. United States of America*, No. 89-369 cert. granted December 4, 1989, the First Circuit acknowledged that Congress did not intend the state's primary role under the Act be subverted by EPA inaction, but held that dismissal was too drastic a remedy. Without reference to legal authority or factual distinction, the First Circuit returned the case to the District Court for a determination as to what penalties, if any, would be appropriate.

In the instant case, the Sixth Circuit expressly disagreed with both the Fifth Circuit and the First Circuit. Although it agreed that dismissal was too drastic a remedy and that the case should be returned to the District Court for a hearing on the appropriate penalties, it recognized the potential injury to a company acting in good faith and complying with the proposed SIP revision by the continuation of the litigation. Therefore, it shifted the burden of proof to the EPA to show its delay was reasonable before any hearing on the appropriate penalties could take place. This decision below now creates two conflicts among the circuits and raises important recurring issues concerning the enforcement of the Clean Air Act.

A. Statutory Background

The Act was designed to create a partnership between the states and the federal government with respect to the regulation of air pollution. The basic division in the Act is straightforward. The federal government acting through the EPA has the responsibility of establishing national air quality goals, called the National Ambient Air Quality Standards. 42 U.S.C. sec. 7409 (1982).

This Court has affirmed that the Act places primary responsibility on the states to select the options to be used to meet the national standards and so long as those choices are consistent with the basic statutory requirements the EPA must approve the SIP. *Train v. National Resources Defense Council*, 421 U.S. 60, 79 (1975).

Congress anticipated that the design and administration of the appropriate SIPs would be an ongoing process for the states. Thus, the statute

provides for revisions to be made to the SIP from time to time as the states deem appropriate. The EPA is required to approve or disapprove these revisions within four months. 42 U.S.C. sec. 7410(a)(2), (3). In this case, the EPA has never formally ruled on the Jefferson County generic SIP revision ("SIP I") that has been pending for nearly a decade. It took over three years to disapprove the source specific SIP revision ("SIP II") that Alcan and the state submitted in an attempt to deal with the uncertainty created by the EPA's failure to act on SIP I. When the EPA disapproved SIP II it relied for its legal authority on regulations that were not in effect during the four month period during which it was obligated to act. The result of these actions has been to leave the State of Kentucky, Petitioner Alcan and the public in a state of uncertainty. The impact of this uncertainty has not only disrupted the rational business planning process of Alcan, but it also affected numerous other segments of the public many of whom expressed their concerns directly to the Sixth Circuit through the Amicus mechanism.

B. The Kentucky SIP

Alcan owns and operates a laminating facility in Louisville, Kentucky. The laminating process is the source of volatile organic compounds ("VOC") emissions. The plant is an independent economic unit and is not part of a process which leads to a final product. All of the facility's products are sold to third parties.

The Kentucky SIP which was in force with respect to the plant required point source control. Point source control means was that each coating line had to comply with an emission limitation, regardless of the overall emissions from the total facility. This made it impossible for this facility and others to operate

economically because of the vast capital needed to obtain point source control. Moreover, the EPA had recognized in their bubble policy proposal that the real issue was not what each line discharged, but what the entire plant discharged as a unit. For example, if the tolerated level of emission was two units of VOC's, and there were two lines, point source regulated them at 1 unit each. But, if one line operated with a non VOC coating, or did not operate, logically one should be allowed to operate the other line at 2 units to meet the required limit. Point source rules did not permit this flexibility, so the EPA proposed a "bubble policy" which treated the entire plant rather than each stack, as an emission source.

In 1982 the plant was owned by Atlantic Richfield Company ("ARCO"), the third party defendant in this case. At the same time, the State of Kentucky, acting through the Jefferson County Air Pollution Control District ("JCAPCD") proposed SIP I which provided an option to comply with the emission standards using a bubble. ARCO operated the plant in compliance with SIP I, which was never approved or disapproved by the EPA, and is still in limbo today. In 1985 Alcan acquired the plant from ARCO. In the representations concerning environmental compliance, ARCO made no comment concerning the plant's non-compliance with the Kentucky SIP, apparently relying on JCAPCD's assurances that it was in compliance.

Sometime after Alcan acquired the plant, it learned of the dispute between the state and the EPA over SIP I. It recognized that the dispute was long-standing and in 1986 it matured into a lawsuit by the Jefferson County Air Pollution Control District ("JCAPCD") against the EPA for failure to act on SIP I.[1] Alcan had a

[1] *Air Pollution Control District of Jefferson County, Kentucky v. U. S. EPA*, No. C-86-0519-L-B (W.D. Ky.).

serious business problem. The plant was clearly not economic confronted with point source compliance.[2] For its own good and that of the numerous employees, a rapid determination as to the plant's fate was essential. Therefore, Alcan, after informing the JCAPCD, commenced a series of meetings with the EPA to seek a source specific SIP revision. Those meetings, which involved a direct meeting with the Director of the Air Pollution program at EPA headquarters in Washington, D.C., continue to this day and resulted in two SIP revisions by JCAPCD: SIP II which is the subject of this litigation and SIP III which is still pending and has been pending for over four months.

EPA was directly involved in the formulation of both SIP II and III. Nonetheless on July 14, 1986, four months after SIP II had been submitted, the EPA, without taking any action on SIP II, served notice on the plant of non-compliance with the original SIP. On July 15, 1987, the EPA filed this enforcement action, more than one and a half years after SIP II was filed and while it was still pending. Alcan promptly moved to dismiss the case relying on *American Cyanamid, supra.* Rather than replying to Alcan's motion, the EPA asked the District Court to dismiss Alcan's motion without prejudice pursuant to Rule 56(f), stating that it believed that Alcan may not be in compliance with the SIP II, but required discovery to make the determination. Alcan responded with an affidavit pointing to the fact that the EPA motion should be denied since it had, in fact, had in its possession the daily emissions reports which were available to the JCAPCD and in addition had a

[2] Based on 1989 profits for the facility, point source compliance would require capital expenditures in excess of 3 times total net profits while operating expenditures would absorb an amount equal to an additional 25% of 1989 net profits.

comprehensive engineering study covering all the relevant data which had been prepared for them in connection with the submission of SIP II.[3] The District Court denied the government's motion for Rule 56(f) relief and granted Alcan's motion to dismiss, concluding that this case should be dismissed but the EPA could seek enforcement after SIP II was rejected. The EPA filed a motion for reconsideration which was denied, but contrary to the later conclusion of the Sixth Circuit, the District Court held that the EPA could seek enforcement after the SIP was disapproved and that under the proper circumstances its penalties could be retroactive. The EPA appealed to the Sixth Circuit.

The Sixth Circuit sustained the District Court in part and reversed in part. The Sixth Circuit sustained the District Court's holding that the Act required the EPA to act on SIP revisions in four months, but concluded that dismissal was too severe a consequence, since the EPA would often miss the four month deadline. Like the First Circuit, the Sixth Circuit acknowledged that Alcan had the equities on its side in the case, thus it adopted in part the reasoning of the First Circuit in returning the case to the District Court. However, the Sixth Circuit apparently responded to Alcan's argument that continued litigation, given the inherent uncertainty

[3] The Sixth Circuit improperly concluded that this case needed to be returned to the District Court for a determination as to whether Alcan was in compliance with SIP II. In fact, the District Court did determine that EPA had the data available to them to evaluate whether Alcan was or was not in compliance with the SIP II and, if appropriate, to rebut the JCAPCD affidavit of compliance. The EPA did not offer any affidavit in its motion for reconsideration. Thus, the Alcan affidavit stands unrebutted and the District Court's explicit refusal to grant Rule 56(f) relief, which was not appealed, entitles Alcan to rely on the conclusive determination of that fact issue by the District Court.

and costs of the legal system, would result in most companies simply shutting down a marginal facility and that would result to a large degree in the states losing their primary role under the Act to make choices among options because many options would no longer be available. The Sixth Circuit solution to reduce the litigation risk was to shift the burden to the EPA to show that its delay was reasonable before it could seek retroactive penalties.[4]

[4] In fact, the Sixth Circuit went so far as almost determining that the EPA's delay was unreasonable since it said that it would be unreasonable if Alcan could demonstrate that the legal bases for disapproving SIP II were not in existence at the time the EPA was compelled to act. The Sixth Circuit had before it the Federal Register Notice of Disapproval of SIP II which explicitly demonstrated that to be the fact.

REASONS FOR GRANTING WRIT

This Case Has Facts That Should Be Directly Considered By This Court.

Alcan is mindful of the fact that this Court has granted a writ of certiorari in *General Motors, supra,* which addresses the same legal issues that exist in this case. Alcan is also mindful of the fact that participation in that case as an Amicus Curiae is one means by which Alcan could inform this Court of its case. Nonetheless, Alcan believes this Court's appreciation of the issues presented in the *General Motors* case will be greatly enhanced by the consideration of this case in conjunction with that of General Motors.

Although the legal issues in *General Motors* and this case are the same, the factual circumstances are dramatically different. In *General Motors* the failure of the EPA to act promptly had the potential impact of increased costs for the continuation of an obsolete paint line and the potential to discourage the use of some other more environmentally attractive coating alternative. This case, by contrast, involves the continued viability of an entire operation with the attendant consequences to the employees and economic disruption to the State. In fact, at the Sixth Circuit a wide range of the interested public, which included four unions, The Louisville Area Chamber of Commerce, The City of Louisville and the Commonwealth of Kentucky expressed their views as to how the EPA's conduct adversely affected them. Alcan believes that the widespread impact on the public of the Alcan facts could not be effectively communicated to the Court through an *amicus* participation by Alcan.

Second, an evaluation of the propriety of EPA conduct is more clearly understood in the Alcan case. Unlike the situation in *General Motors*, the EPA was actively involved in the preparation of SIP II and SIP III prior to and during its enforcement activities. The Sixth Circuit opinion simply does not describe the comprehensive involvement of the EPA in the development of both SIP II and SIP III. Moreover, similar facts do not appear in *General Motors*. It is only by understanding the details of these activities that this Court can fashion enforcement standards under the Act that would be fair to all concerned.

Third, this case arises out of a clear and continuing dispute between the state and federal government as to who will exercise primary responsibility under the Act. In *Train, supra*, this Court acknowledged the state's primary role and the EPA's supervisory role under the Act. This case, more than the *General Motors* case, illustrates that *Train* has done little to practically define the roles of the respective governments under the Act and that the conflict between the state and federal government is not something that happens on rare occasions, but is constant and continuing. This case also illustrates how the well-intentioned company, who wishes to do its utmost to comply, is continually subject to inconsistent signals as to what constitutes compliance and regardless of the effort expended, cannot extract itself from the conflict between the EPA and the states.

Finally, unlike *General Motors*, the facts of this case illustrate how, as a practical matter, the states are not only deprived of a primary role under the Act, but can be turned into a rubber stamp of decisions made directly by the EPA. The facts of Alcan's progression from SIP I to SIP III illustrate that by the time events had progressed

to SIP III, the potential consequences of enforcement actions and the need for some level of certainty in the business decision-making process had virtually eliminated the JCAPCD from its primary role. The facts will demonstrate that JCAPCD had to concede that Alcan should simply by-pass it and go directly to the EPA to work out a SIP, and come back to them for approval of what the EPA had approved. The JCAPCD recognized that regardless of the theoretical allocations of responsibility recognized by this Court, it was powerless under these circumstances to exercise its role.

This case illustrates more dramatically than *General Motors* the important need to fashion enforcement standards under the Act which are sensitive to the real economic and business decisions that managers acting with the best of intentions must make. This case certainly presents the same issues of conflict between the Circuits and federalism as presented by *General Motors*. This case's very existence confirms the recurring nature of the problem. However, unlike *General Motors,* this case presents these issues in the context of a factual setting that illustrates the impact of this conflict on the very public whose interests Congress was considering when it decided on the allocation of responsibility. It also demonstrates the importance of carefully crafting an enforcement mechanism with due regard to the potential practical impact on the continued existence of options from which a state may choose. The Sixth Circuit clearly recognized this issue when it refused to accept the solution proposed by the First Circuit in *General Motors, supra.* However, Alcan believes and will argue to this Court that the Sixth Circuit's solution, although it may resolve this case, does not from a policy perspective constitute a long term solution for similar cases which do not have certain facts unique to this case.

CONCLUSION

For the foregoing reasons Alcan respectfully requests that this Court issue a writ of certiorari to the Sixth Circuit in this case.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit

(Decided and Filed November 21, 1989)

No. 88-6300

United States Court of Appeals

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ALCAN FOIL PRODUCTS DIVISION
OF ALCAN ALUMINUM CORPORATION,
Defendant and Third-Party
Plaintiff-Appellee,

ATLANTIC RICHFIELD COMPANY,
Third-Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY.

[889 F.2d 1513; 1989 U.S.
App. LEXIS 17373]

Before: KRUPANSKY and RYAN, *Circuit Judges*, and LIVELY, *Senior Circuit Judge*.

LIVELY, *Senior Circuit Judge*, delivered the opinion of the court in which KRUPANSKY, *Circuit Judge*, joined. RYAN, *Circuit Judge* delivered a separate concurring opinion.

LIVELY, *Senior Circuit Judge*. This case arose under the Clean Air Act as amended, 42 U.S.C. §7401 et seq. (the Act). The government brought this enforcement action in the district court pursuant to section 113(a) of the Act, 42 U.S.C. §7413(a). It alleged that Alcan's Louisville, Kentucky aluminum foil products plant was emitting air pollutants known as volatile organic compounds (VOC), which are precursors in the formation of ozone, in excess of the limits prescribed by Kentucky's state implementation plan (SIP). The complaint prayed for an injunction and damages of $25,000 for each day the defendant is in violation of the Act and the SIP.

In its answer Alcan pled as an affirmative defense that Kentucky had filed with the Environmental Protection Agency (EPA) a proposed revision to the SIP, but that EPA had failed to take action on the proposal, although it was filed more than sixteen months before the government commenced this action. Alcan further alleged that it was in compliance with the standards of the proposed revision. Alcan filed a motion for summary judgment, which the district court granted. The district court held that the Act requires EPA to act on proposed SIP revisions within four months. *United States v. Alcan Foil Products Division*, 694 F. Supp. 1280 (W.D. Ky. 1988). On motion for reconsideration, the district court held that even if the "four-month rule" does not apply, EPA should not be permitted to bring an enforcement

action against a polluter who is in compliance with a proposed revised SIP, which might be approved eventually but upon which the EPA has failed to act. The district court dismissed the action. We affirm in part and reverse in part.

I.

Under the Act the Administrator of EPA is required to establish national ambient air quality standards (NAAQS). As the first step in the process EPA publishes lists identifying emissions that are reasonably believed to endanger public health and welfare. EPA then issues air quality criteria for each listed pollutant. 42 U.S.C. §7408(a). Finally, EPA, following statutory procedures and timetables, promulgates NAAQS for each listed pollutant. These NAAQS limit the emissions of each pollutant to a level consistent with the achievement and maintenance of the desired air quality. 42 U.S.C. §7409.

After it has established the NAAQS for each pollutant, the role of EPA is secondary and that of the states becomes primary. *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975). This is made clear by section 107(a) of the Act, 42 U.S.C. §7407(a), which provides:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Congress amended the Act in 1970, adding section 110, 42 U.S.C. §7410, Section 110 provides for the promulgation and revision of SIPs. Section 110(a)

requires each state to adopt and submit to EPA an SIP within nine months after EPA has established primary and secondary NAAQS for any pollutant. The SIP must "provide[ ] for implementation, maintenance, and enforcement of" each standard in each air quality control region within the state. 42 U.S.C. §7410(a)(1). The Act contains many time restrictions. Section 110((a)(2) applies to original SIPs and provides that EPA "shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof." EPA must approve a plan if it satisfies the procedural and substantive requisites set forth in subparagraphs (A) through (K). Section 110(a)(3) deals with SIP revisions. Subsection (A) provides:

> The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

II.

Louisville is in the Kentucky air pollution control region that is designated the Air Pollution Control District of Jefferson County (the Region). Region Regulation 6.29, a part of the Kentucky SIP, established the emissions standards for the VOCs emitted by Alcan's rotogravure printing presses. Under the existing SIP, emission compliance at the Alcan plant is determined at each emission source. Thus, if the emissions from one press exceed the standards, the entire plant is out of compliance.

A.

Alcan prepared a proposed revision to Regulation 6.29, and after approval by the Region, Kentucky submitted the proposed revision to EPA on March 3, 1986. The proposed revision would adopt the "bubble concept" for determining compliance rather than the existing method of determining compliance at each individual emissions source. Under the bubble concept the total emissions of a given pollutant from a plant or area, over a prescribed period, are calculated to determine compliance or noncompliance. Thus, a bubble permits a "supercomplying source" to offset an "undercomplying source," thereby enabling the entire plant to meet applicable emissions standards. The proposed revision used a thirty-day averaging period. As proposed, if the average of Alcan's Louisville VOC emissions over a thirty-day period met the standards under the revision, Alcan would be deemed in compliance.

EPA had previously approved the bubble concept generally, but it advised the Region that the proposed plan was deficient. Following a request for reconsideration, EPA advised the Region on July 7, 1986, that it usually recommended only one day or one week averaging periods for emissions, but that Alcan "would be out of compliance, even if the 30-day averaging time was granted."

B.

Several events occurred while the parties were attempting to resolve their disagreements over the proposed revision. First, the Region filed suit in district court to compel EPA to approve the proposed revision. Such an action may be brought pursuant to section

304(a)(2) of the Act, 42 U.S.C. §7604(a)(2), by any person who claims that EPA has failed to perform a nondiscretionary act or duty imposed upon it by the Act. Soon thereafter, without reference to the proposed revision, EPA notified Alcan that seven of its presses failed to comply with existing Regulation 6.29. This notice of noncompliance led to further discussions between EPA and Alcan. While these discussions were taking place, EPA published uniform criteria and procedures for bubble plan reviews. 51 Fed. Reg. 43814-60 (Dec. 4, 1986). The bubble plan contained in the proposed Kentucky SIP revision did not satisfy these criteria.

On July 16, 1987, the United States, at the request of EPA, filed this enforcement suit. At that time EPA had taken no formal action with respect to the proposed SIP revision. Although the regional administrator of EPA had recommended that the proposed revision be disapproved, at the time the case was submitted to the district court on Alcan's motion for summary judgment, EPA still had not acted on the proposed revision. We are advised that after the district court entered final judgment dismissing the action, EPA rejected the proposed SIP revision for failure to demonstrate the necessity of employing an averaging period greater than twenty-four hours. 53 Fed. Reg. 40745 (Oct. 18, 1988).

III.

At least five courts of appeals have considered the question of whether EPA is required to act on a proposed SIP revision within four months after its submission. Four courts have applied the four-month rule to proposed revisions. See *Duquesne Light Co. v. E.P.A.*, 698 F.2d 456, 471 (D.C. Cir. 1983); *United States v.*

General Motors Corp., 876 F.2d 1060, 1066 (1st Cir. 1989); *Council of Commuter Organizations v. Gorsuch*, 683 F.2d 648, 651-52 n.2 (2d Cir. 1982); *Council of Commuter Organizations v. Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *American Cyanamid Co. v. E.P.A.*, 810 F.2d 493, 495 (5th Cir. 1987); *General Motors Corp. v. E.P.A.*, 871 F.2d 495, 498 (5th Cir. 1989). This court is the only one to have suggested that the four-month rule does not apply. In *United States v. National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985), we affirmed judgment for the government in an enforcement action. In upholding the district court, we rejected the defendant's contention that enforcement violated the substantive due process rights.

National Steel and the present case are similar in that the defendant in each sought to avoid expenditures to bring its operations into compliance under an existing SIP by proposing a revision based on the bubble concept. In *National Steel*, however, there had been an earlier section 113 action in which the government and National Steel had entered into a consent decree setting forth the dates by which National Steel must take various steps to comply with the existing SIP. The consent decree specifically provided that an application for a bubble would not postpone the compliance dates. Despite this provision, National Steel did not begin installing pollution control equipment by the required dates, and cancelled purchase orders for the equipment when it sought approval of the bubble alternative. We agreed with the district court that National Steel "had made a business decision to risk the penalties inherent in violating the consent decree on the gamble that the EPA would approve the bubble." 767 F.2d at 1179.

It is clear that we decided *National Steel* on due process grounds. We concluded that all the circumstances, most importantly the consent decree's provision prohibiting the use of a proposed SIP revision to postpone compliance dates, negated a finding of a due process violation. Our only reference to the four-month rule consisted of a footnote. In response to one of National Steel's alternative arguments, we wrote:

> National claims that section 110(a)(2) of the Clean Air Act . . . requires the EPA to approve or disapprove proposed SIP revisions within four months of their submittal by the state. Section 110(a)(2) requires action within four months for general state plans submitted under section 110(a)(1), not for revisions to state plans governed by section 110(a))3)(A).

767 F.2d at 1182-83 n. 1.

We do not believe that the quoted language precludes our reexamination of the question. As the First Circuit noted in *United States v. General Motors Corp.*, 876 F.2d at 1066, the statement is "arguably dicta." Upon close scrutiny the footnote says nothing more than that section 110(a)(2), which applies to "general" state plans, does not require action within four months on proposed revisions that are governed by section 110(a)(3)(A). Alcan and amici do not contend that section 110(a)(2) requires anything with respect to proposed revisions. They argue that section 110(a)(3)(A),which does apply to revisions, incorporates the four-month requirement, at least by implication. They contend that EPA's duty, set out in section 110(a)(3)(A), to approve any SIP revision if EPA "determines that it meets the requirements of paragraph (2)" refers to the time limit of section 110(a)(2) as well as to the substantive requirements of section 110(a)(2)(A) through (K). This

reading of the statute is supported by the language of section 110(g)(1),[1] where Congress referred to the duty to approve or disapprove a proposed plan revision "within the required four month period." This court did not refer to section 110(g) in *National Steel*.

We believe the courts that have examined the matter and found the four-month rule to apply have reached the correct conclusion. We recognize that such a requirement is not manifest from reading section 110(a)(3)(A). However, it seems clear to us that Congress intended to incorporate the time limit, and felt it had done so by referring to "the requirements of paragraph (2)." Although a subsequent Congress' interpretation of legislation enacted by an earlier one is not binding, that interpretation carries obvious weight. Section 110(a) and section 110(g) were enacted within seven years of each other at a time when environmental issues were in the very forefront of national concern. We are persuaded that the ninety-fifth Congress correctly interpreted the intent of the ninety-first.

Further, as Judge Coffin pointed out in *General Motors*, this is not an instance in which an agency's interpretation of a statute should be accorded great deference:

> Congress did not use inherently broad language here suggesting that it intended for the EPA to fill in the gaps, nor is there any other indication that Congress wished to delegate interpretative authority to the Agency on this issue. Moreover, we think it

[1] Section 110 was added to the Act in 1970. In a 1977 amendment, codified as section 110(g), Congress granted to state governors the authority to issue temporary emergency suspensions of parts of an SIP for which a proposed revision had been submitted and "which [EPA] has not approved or disapproved under this section within the required four months period." 42 U.S.C. §7410(g)(1).

> dangerous to defer in a situation such as this where the Agency has a substantial institutional interest in not imposing constraints on itself.

876 F.2d at 1066. We agree. Given the primary role of the states in implementing air quality standards, it is difficult to conclude that EPA is not required to act with dispatch on a revision proposed by a state. Application of the four-month rule to proposed revisions will assure reasonably prompt action.

IV.

The courts that have found the four-month deadline applicable to SIP revisions have not agreed on the consequences that should follow from EPA's failure to act within that time frame. In the two *Council of Commuter Organization* cases, EPA's failure to act on a proposed SIP revision was a subsidiary issue. Although the Second Circuit held in both decisions that the Act requires EPA to approve or disapprove a proposed revision within the four-month period, 683 F.2d at 651-52 n. 2 and 799 F.2d at 888, the court did not examine all of the possible judicial responses to EPA's failure to act. It did note, however, that "tardiness by EPA is not a basis for granting a petition for review of action that satisfies the substantive requirements of the Act," and that the remedy for undue delay is a suit to compel EPA to perform a nondiscretionary act. 799 F.2d at 888.

The District of Columbia Circuit and the Fifth Circuit have examined the available options, and have reached quite different conclusions. Although the cases in both circuits involved petitions to review agency action under section 120[2] rather than a section 113

[2] Section 120, 42 U.S.C. §7420, provides penalties for noncompliance with established standards sufficient to remove any economic advantage that the violator would gain over complying sources—"the economic value of noncompliance."

enforcement action, we believe the approach to the issue of consequences for the agency's failure to act within four months should be the same. In *Duquesne Light Co. v. E.P.A.*, 698 F.2d 456 (D.C. Cir. 1983), the court rejected the industry petitioners' claim that a source in compliance with the standards of a proposed revision upon which EPA has failed to act may not be assessed penalties even though it is out of compliance with the existing SIP. As the court noted, a proposed revision is exactly what its name implies—a proposal, and nothing more. *Id.* at 471. If the industry view were adopted, "states could circumvent requirements of the Act by proposing revisions to their SIPs." *Id.* The court, however, found that it would be inequitable to permit EPA to continue to assess penalties against sources out of compliance with existing SIPs, but in compliance with proposed revisions, no matter how long EPA took to act on the proposals. The court adopted a solution that it believed would be fair to both the industry sources and EPA while at the same time protecting the public from the hazards of air pollution. It required EPA to develop a regulation under which once the statutory deadline for acting on a SIP revision passes, the noncompliance penalty is held in abeyance pending final action on the SIP by EPA. Should EPA ultimately reject the SIP, the penalty should be calculated back to the deadline, with interest. Such a regulation will protect a source in compliance with air quality standards from the time EPA should have approved an eventually approved SIP revision and will remove any economic benefit accruing to a source not in compliance with the law if the SIP revision is not approved.

Id. at 472.

The Fifth Circuit has followed a different approach. Emphasizing the primary role of the states in implementing the Act and the need for cooperative efforts, the court held in *American Cyanamid Co. v. E.P.A.*, 810 F.2d 493, 500 (5th Cir. 1987), that "the EPA may not collect a penalty for the period between (1) four months after a state submits a proposed revision and (2) the date the EPA rejects that revision." The court also held that "when the EPA issues its Notice of Noncompliance more than four months after a state proposes a SIP revision, the EPA may not commence §7420 proceedings until it rejects the proposed revision." *Id.* at 501. The court applied the same reasoning where EPA failed to act on a "delayed compliance order" issued pursuant to section 113(d) within 90 days of the notice of issuance. *General Motors Corp. v. E.P.A.*, 871 F.2d 495, 487-98 (5th Cir. 1989).

B.

Writing for the court in *United States v. General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989), Judge Coffin attempted to fashion a middle course. Shortly before the compliance deadline under the existing SIP, General Motors proposed an SIP revision to extend the deadline so that General Motors could complete construction of complying facilities. Massachusetts approved the revision. A year and a half later, the government filed a §113 action to enforce the existing SIP. One year after that, two and a half years after Massachusetts submitted the proposed revision, EPA finally rejected the proposal. The district court applied the four-month rule, barring an enforcement action under the existing SIP during the period between expiration of the four-month deadline and the time EPA finally acts on the proposed revision. Accordingly, the district court dismissed the enforcement action.

After considering arguments on both sides, the court of appeals agreed that "the four month deadline was meant to apply to EPA review of SIP revisions as well as to EPA review of original SIPs." *Id.* at 1066. While acknowledging that the Fifth Circuit's rule furnishes the strongest incentive for EPA to act within four months, the court concluded that an automatic bar to an enforcement action is not the best remedy. *Id.* at 1067. The First Circuit agreed with the Fifth Circuit, however, that the D.C. Circuit's rule offered too little incentive for EPA to act with dispatch. Accordingly, the First Circuit approved a "twofold" remedy. *Id.*

Under one approach, if either an emissions source or a state believes EPA has not taken final action on a proposed revision within a reasonable time, the affected party may, after the four-month period expires, bring an action under section 304(a)(2) to compel the agency to act. In such a proceeding the district court "should assess the Agency's reasons for not complying with the four-month time limit and take such action as it deems reasonable." *Id.* at 1068. The court must consider all the circumstances of each case, using failure to observe the four-month requirement as "a rough guidepost." *Id.*

The court should apply the same principles under the second alternative. If EPA files a section 113 action to enforce the existing SIP when a proposed revision has been submitted for more than four months without final approval or disapproval, rather than dismissing the action, the district court should adjust the penalties after considering (1) the reasonableness of the delay, (2) the prejudice the delay has caused the company, and (3) the factors listed in section 113(b).[3]

[3] Section 113(b) provides: "In determining the amount of any civil penalty to be assessed under this subsection, the courts shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. §7413(b).

The court gave an example of how its formula would work:

> If, for example, a trial court finds that the review process should have taken ten months rather than two years, it may decline to award penalties for the fourteen months of unwarranted delay. Accordingly, if on remand in this case, the district court finds that GM was prejudiced by the Agency's lengthy review and that the delay was not justified or that some portion of the delay was not justified, it may reduce the penalties in a manner it sees fit.

Id. at 1068 (footnote omitted).

V.

In the present case the district court followed the Fifth Circuit's decision in *American Cyanamid* and dismissed the enforcement action. We believe this was error. The Supreme Court has expressed reluctance to treat statutory commands that an agency act within a given time as jurisdictional requirements. In *Brock v. Pierce County,* 476 U.S. 253 (1986), the Court stated in a unanimous opinion:

> This Court has frequently articulated the "great principle of public policy, applicable to all governments alike, which forbids that the public interest should be prejudiced by the negligence of the officers or agents to whose care they are confided." *United States v. Nashville, C. & St. L. R. Co.,* 118 U. S. 120, 125 (1886). See also *Guaranty Trust Co. v. United States,* 304 U. S. 126 (1938); *Stanley v. Schwalby,* 147 U. S. 508, 515 (1893). We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.

Id. at 260 (footnote omitted).

A.

As a practical matter, in view of past performances, EPA will likely continue to miss the four-month deadline. It is not clear whether the requirement is unrealistic in view of the number of proposals submitted, or whether EPA's procedures are too cumbersome. Regardless of the cause for delay in so many cases, courts must apply remedies that, as nearly as possible, promote the primary purpose of the Act—improvement of the quality of the nation's air. The public should not suffer because of EPA's failures.

Clearly remedies less drastic then dismissal are available for EPA's failure to act within four months. Judged by the history of this case, the alternative remedy of suit under section 304(a) to compel EPA to rule is not very effective. As we have noted, the Region filed such an action before the government filed the present one, but as far as the record shows, nothing came of it. Apparently, when the government filed the enforcement action the court and the parties viewed that action as the best vehicle for resolving the issues in dispute. For whatever reason, it is clear that the Region's section 304(a) action did not cause EPA to rule on the proposed revision. The final ruling on the proposed revision came well over two years after the section 304(a) suit was filed.

We believe the most effective remedy is the second one proposed by the First Circuit. The district court clearly has discretion to determine what penalties should be imposed for noncompliance. Section 113(b) provides for an injunction or a civil penalty of *not more than* $25,000 per day of violation, or *both*. Any prejudice to the violator resulting from EPA's delay in ruling on a

proposed SIP revision and EPA's reasons for delay are among the factors to be taken into account in determining penalties.

When the government files a section 113 suit against an emissions source that claims to be in compliance with the standards of a proposed SIP revision upon which EPA has failed to act within four months, the remedy will depend upon each party's proof. If the source does not establish that it is in compliance with the proposed revision, the court may assess penalties from the date of the notice of noncompliance. If the source demonstrates that it has met the standards of the proposed revision, the government has the burden of justifying EPA's delay in acting on the proposal. The court must then balance the reasonableness of the delay against whatever prejudice the source is able to establish. This balancing will determine whether a civil penalty fine is proper and, if proper, whether the fine will commence with the date of notice of noncompliance, the date of final action on the proposed SIP revision, or some date in between.

B.

Here Alcan has proposed and Kentucky has approved a SIP revision. The government issued a notice of noncompliance with the existing SIP, even though EPA had not rejected the proposal within the required four-month period. Alcan asserts that it has complied with the proposed SIP. If it can prove this assertion, then the government must prove that EPA's delay in taking final action on the proposal was reasonable. In this regard, Alcan and amici argue that the proposed bubble plan would have qualified for approval under EPA's "generic bubble rule" in force when Kentucky submitted the proposed revision. Alcan claims that EPA

delayed its ruling on the proposed SIP revision until it could formulate regulations that would render the proposed bubble plan unacceptable. If these claims are true, the government cannot satisfy the burden of proving that EPA's delay in rejecting the proposals was reasonable in this situation, the district court may assess fines beginning only from the date the new bubble regulations took effect. Regardless of the date from which the district court begins assessing civil penalties, the court retains the discretion to assess the amount of penalties based on the equities as disclosed by the proof.

CONCLUSION

Although the district court correctly concluded that the four-month deadline for EPA action applies to proposed SIP revisions as well as to original SIPs, it applied the wrong remedy. The government's action sought penalties only for violating the existing SIP, but Alcan's affirmative defense rested on EPA's failure to act on the proposed revision. There is no dispute that Alcan was in violation of the standards established under the existing SIP. Given Alcan's defense, it was necessary for the court to know whether Alcan was in compliance with the proposed revision as the first step in determining the penalty issue. The evidence on this question, consisting of conflicting affidavits, was in sharp dispute.

The summary judgment of dismissal is reversed, and the case is remanded. The district court will reinstate the action and conduct further proceedings consistent with this opinion.

CONCUR:

RYAN, *Circuit Judge*, concurring. My brother's excellent opinion resolves, correctly I think, at least two very difficult issues. While I concur in the court's judgment, I write separately because I am uncomfortable with the court's description of the criteria to be considered by the district court upon remand, and presumably by other courts in like cases hereafter, in determining the remedy that may be imposed in an enforcement action brought by the government under 42 U.S.C. §7413(a) in which the alleged polluter previously filed a proposed revised SIP with the Environmental Protection Agency.

The majority opinion rejects as unwarranted the remedy formula adopted for such cases in the Fifth and District of Columbia Circuits. *American Cyanamid Co. v. U.S.E.P.A.*, 810 F.2d 493 (5th Cir. 1987), and *Duquesne Light Co. v. E.P.A.*, 698 F.2d 458 (D.C. Cir. 1983). it subscribes instead to the second prong of the remedy adopted by the First Circuit in *United States v. General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989).

While I have considerable reluctance to tell the district court on remand, and implicitly, district courts faced with similar cases in the future, what may and may not be considered in determining appropriate penalties for a proved violation of §113(a), I must confess that Congress' failure to address the situation that has arisen in this case leaves us no alternative. I agree with my brothers that we are duty bound to fashion a remedy formula in a case of this kind, particularly given the diametrically opposite enforcement formulae spelled out in the cited cases from the Fifth and District of Columbia Circuits. Moreover, I agree that of the choices suggested to us, the approach devised by the General

Motors court makes the most sense and most nearly conforms to the language of the statute and the apparent intent of Congress.

I write separately, however, because the majority opinion's description of the process and criteria for the assessment of penalties and remedies for a §113(a) violation where a proposed SIP revision is pending, seems to focus, inappropriately in my judgment, more upon the question of the alleged polluter's compliance with the proposed SIP revision than with the existing SIP, for violation of which the §113(a) action was brought in the first place.

According to the majority opinion, when the government files a §113(a) action against an alleged polluter which defends on the theory that it is in compliance with a proposed revised SIP, the question of penalties, if any, is determined substantially, if not entirely, by litigation about whether the polluter has complied with the proposed revised SIP:

> If the source does not establish that it is in compliance with the proposed revision, the court may assess penalties from the date of the notice of noncompliance. If the source demonstrates that it has met the standards of the proposed revision, the government has the burden of justifying EPA's delay in acting on the proposal. The court must then balance the reasonableness of the delay against whatever prejudice the source is able to establish. This balancing will determine whether a civil penalty fine is proper and, if proper, whether the fine will commence with the date of notice of noncompliance, the date of final action on the proposed SIP revision, or some date in between.

Slip op. at 14-15.

While the foregoing is a quotation from only a portion of the majority opinion, it embodies the essence of the court's instructions to the lower court on remand, and presumably to all district courts that will address cases of this kind in the future. The difficulty it seems to me is that the court's opinion describes a procedure for determining appropriate penalties for noncompliance with a proposed revised SIP that has no legal efficacy whatever, and appears to completely lose sight of the fact that the government's enforcement action is all about an alleged violation of an existing SIP—not some other, and one can be sure, different and less burdensome, SIP the alleged polluter wished were in place.

Perhaps it is merely a matter of emphasis, but I prefer the description of the remedy determining process as set forth in *General Motors*, because there it appears to be emphasized that the business at hand is a determination whether the existing SIP has been violated and what penalties should follow therefrom if it has. With that as the primary emphasis, the *General Motors* court observes, almost as an aside, that in determining penalties the district court is warranted in taking into account "other factors" among which is the reasonableness of the government's delay in acting upon the alleged polluter's proposed revised SIP.

The *General Motors* court said:

> When the Agency brings an enforcement action under §113, the district court has the responsibility for determining the amount of penalties to assess. The Act expressly permits the court to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." §113(b). The EPA

> agrees that, among these "other factors," the court may consider the reasonableness of the Agency's delay and the prejudice, if any, suffered by the company as a result. If, for example, a trial court finds that the review process should have taken ten months rather than two years, it may decline to award penalties for the fourteen months of unwarranted delay. (Emphasis added.)

876 F.2d at 1068.

I do not suggest for a moment that my brother's opinion does not faithfully restate the remedy formula announced in *General Motors* in a way that is relevant to the case at hand. I suggest only that the text of the majority opinion should not be read as adopting a rule for this circuit that the way for a polluter to avoid penalties for an out-and-out violation of an existing SIP is to file a proposed revised SIP "wish list" and then when a §113(a) enforcement action is brought, file an affirmative defense alleging compliance with a proposed revised SIP and take comfort that the enforcement litigation will have to do with compliance with the proposed SIP and not the existing one.

Why a proven polluter should not be appropriately penalized for a violation of an existing SIP, simply because it has complied with a proposed SIP that it wished had been adopted and the agency has not adopted, is difficult for me to understand.[4] Perhaps the answer is that it will "sufficient unto the day" when we are presented with a district court enforcement decision in which the government attempts to demonstrate that the district court erroneously failed to keep its eye on the ball that was in play instead of the one the "source" wished were.

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[4] In this case for example, when the EPA got around to acting on the appellant's proposed revised SIP it was disapproved.

In all events, I concur in the court's judgment that the summary judgment was improperly entered in this case and that the matter must be remanded for further proceedings.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

(Dated March 15, 1988)

Civil Action No. 87-0434-L(CS)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALCAN FOIL PRODUCTS, Division of
Alcan Aluminum Corporation,
Defendant and Third-Party Plaintiff,

vs.

ATLANTIC RICHFIELD COMPANY,
Third-Party Defendant.

MEMORANDUM OPINION

This is an enforcement action brought by the United States on behalf of the Administrator of the United States Environmental Protecton Agency ("EPA") pursuant to 42 U.S.C. §§7413(b) and 7420 of the Clean Air Act ("Act"), 42 U.S.C. §§7401 et seq. In its complaint, the EPA alleges that the defendant, Alcan Foil Products Division ("Alcan"), is producing excessive

emissions of volatile organic compounds ("VOCs")[1] in violation of emission standards contained in Regulation 6.29 of the Jefferson County Air Pollution control District ("JCAPCD").[2] This matter is presently before the Court on motion by Alcan for summary judgment in its favor pursuant to Rule 56, Fed. R. Civ. P.

Interpreting the evidence in a light most favorable to the EPA, the facts may be stated as follows. See *Anderson vs. Liberty Lobby, Inc.*, _____ U.S. _____, 106 S.Ct. 2505, 2513 (1986) (citation omitted). Alcan operates a laminating facility in Louisville, Kentucky, that manufactures products which include cigarette package foil liners, electric cable wrap, air conditioner fin stock, label stock, composite can stock and hood stock for frozen food trays. In connection with production at the facility, Alcan operates ten (10) rotogravure printing presses. Each of these printing presses either emits or has the potention to emit VOCs. On March 3, 1986, a revision to the existing KSIP was submitted by the Kentucky Natural Resources and Environmental Protection Cabinet to the EPA on behalf of the JCAPCD pursuant to 42 U.S.C. §7410. This proposed KSIP revision included an amended version of JCAPCD Regulation 6.29. Under the existing KSIP, VOC emission compliance at the Alcan facility was determined at each particular emission source. That is, if

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[1] VOCs are "air pollutants" as defined by the Act, 42 U.S.C. §7602(g). JCAPCD Regulation 6.29 requires that VOC emissions by rotogravure presses be kept within certain levels.

[2] JCAPCD Regulation 6.29 is a part of the Kentucky State Implementation Plan ("KSIP") originally approved by the EPA in August of 1981 and subsequently revised and reapproved in January of 1984. A State Implementation Plan or SIP is the means whereby a state may implement and maintain "National Ambient Air Quality Standards ("NAAQS") promulgated by the EPA within its borders. See 42 U.S.C. §§7409 (NAAQS); 7410 (SIPS).

one emission source exceeded the standards established by JCAPCD Regulation 6.29, then Alcan would be in noncompliance. Under the proposed KSIP revision, Alcan's VOC emissions would be regulated by consideration of all point sources of the facility together under a "bubble concept" rather than on an individual basis. Under the "bubble concept", the entire facility could meet compliance requirements by offsetting emissions at one source within the plant by over-compliance at another source. The EPA has approved application of this bubble concept in certain instances.[3]

On July 14, 1986, the EPA served notice on Alcan and the JCAPCD that seven (7) rotogravure printing presses were in noncompliance with Regulation 6.29. An inspection of the Louisville plant by the EPA on October 15, 1986, confirmed that VOC emissions from the presses remained excessive and that the emissions violated both Regulation 6.29 and daily emission standards under the proposed KSIP revision.[4] Following the issuance of the notice of noncompliance, Alcan and the EPA met to discuss the alleged violation as well as the proposed KSIP revision. On December 4, 1986, the EPA issued its revised Emission Trading Policy which established uniform procedures and criteria upon which any approval of bubble plans by the EPA would be predicated.[5] On February 18, 1987, the EPA informed Alcan of deficiencies in the JCAPCD's proposed bubble plan and

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[3] Rice, *EPA Issues Final Emissions Trading Policy Under the Clean Air Act*, EPA Environmental News (1986).

[4] By affidavit, Robert T. Offut, Director of the JCAPCD, states that Alcan has been in compliance with the proposed KSIP revision since November of 1986.

[5] See 51 Fed. Reg. 43814-43860 (1986) (effective date December 4, 1986).

recommended certain revisions that were necessary prior to any approval by the EPA. On July 15, 1987, this action was filed at the request of the EPA. On August 26, 1987, EPA's Regional Administrator signed a proposed rule disproving the JCAPCD's proposed KSIP revision. To date, the EPA has not formally approved or disapproved of the Regional Administrator's action.

In support of its motion, Alcan relies upon the affidavit of the Director of the JCAPCD to establish that it is in compliance with the proposed KSIP revision and has been since November of 1986. See fn. 4, supra. This opinion is based upon monthly operating emission reports provided since March of 1986 by Alcan to the EPA and the JCAPCD. In addition, Alcan has also provided to both the EPA and JCAPCD, a comprehensive engineering report containing emission data for a two-year baseline period from July of 1985 through June, 1987.[6] On the basis of this information, Alcan relies upon the decision rendered by the Court of Appeals for the Fifth Circuit in *American Cyanamid vs. U.S. E.P.A.*, 810 F.2d 493 (5th Cir. 1987), in its assertion

[6] Affidavit of Lawrence Cooke, Manager of Environment, Health, Safety and Security at the Alcan facility since October of 1986. The report prepared by the engineering firm for Alcan entitled "State Implementation Plan Revision" was completed in August of 1987. This report indicates that there is some disagreement between the JCAPCD and the EPA concerning the emission value against which actual emissions at the Alcan facility are compared to determine compliance. The emission value recommended by the EPA is 122.5 tons/year. The JCAPCD has recommended an emission value of 133.9 tons/year and Alcan asserts that 185.0 tons/year is the proper value. This report concludes after conducting a compliance comparison between actual emissions and the 133.9 tons/year value that on an annual basis Alcan complies with the proposed SIP emission allowance. On a daily basis, wherein the allowable KSIP value is 1046 lbs./day, the Alcan facility meets the criteria on all but six (6) days during the two (2) year baseline period.

that summary judgment in its favor is proper. In *American Cyanamid*, the Court held that, when the EPA issues a notice of noncompliance more than four (4) months after a state has submitted a proposed SIP revision under which the alleged violator is in compliance, then the EPA may not commence a civil action under 42 U.S.C. §7420 until it rejects the proposed revision. *Id.* at 501.

Despite this Court's order granting the EPA an extension of time to file a response to Alcan's motion for summary judgment, the EPA has chosen not to respond. Rather, the EPA has requested that this Court deny Alcan's motion without prejudice in lieu of further discovery by the EPA pursuant to Rule 56(f), Fed. R. Civ. P.[7] EPA contends that a genuine issue of material fact exists as to whether Alcan's facility is operating in compliance with the proposed KSIP revision. Because no less than eight (8) months have passed since it filed its complaint, the EPA requests that this Court deny Alcan's motion without prejudice to its refiling after the EPA has had an ample opportunity to obtain meaningful discovery on this issue. In an effort to show that its request is made in good faith, the EPA has submitted the affidavit of its Regional Expert for the Air Compliance Branch wherein he states that, in his opinion, Alcan's facility is in noncompliance with the present JCAPCD Regulation 6.29 as well as with the

[7] Rule 56(f), Fed. R. Civ. P., states as follows:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

proposed KSIP revision. Other than this conclusory assertion, the EPA has failed to inform this Court of any specific information that would tend to support this opinion. Moreover, the EPA has also failed to state any reason why the emission data already supplied by Alcan is insufficient.

It is the opinion of this Court that whether Alcan's facility is in present compliance with the proposed KSIP revision is a non-issue in this action. EPA's complaint wholly fails to allege that this enforcement action is premised upon any violation of the proposed KSIP revision. This is understandable since the existing KSIP remains the standard against which compliance is measured until the EPA acts upon the revision submitted by the JCAPCD. *American Cyanamid*, 810 F.2d at 495 (citations omitted). It is equally apparent that, since the EPA's notice of noncompliance was served more than four (4) months after the JCAPCD submitted its proposed KSIP revision, it may not commence enforcement proceedings until it acts upon the proposed revision. *Id.* at 501.

The EPA seeks to distinguish *American Cyanamid* from the instant action on the basis that the alleged violator in that case would have complied with Louisiana's SIP on schedule had the EPA approved the revision in four (4) months. The EPA contends that the holding in *American Cyanamid* stands for the proposition that the EPA is not estopped from initiating enforcement proceedings unless the alleged violator proves it is in compliance with the proposed SIP revision. This narrow view of the Court's holding in *American Cyanamid* distorts the whole of the opinion.

In *American Cyanamid*, Circuit Judge Jerre S. Williams aptly stated as follows:

> Where, as here, the state has proposed a revision to the SIP which clearly authorizes local businesses to act in accordance with it without running afoul of the Clean Air Act, the interest of the state itself is deeply involved in the required four month approval or disapproval of the proposed revision. It distorts the statutory scheme to place virtually full emphasis upon the business entity involved as a charged "polluter". The emphasis of the statute, rather, is upon the important role which the state plays in defining authorized emissions. . . . The issue then is not so much pollution by American Cyanamid but the default of the EPA in carrying out the congressional intent to work in close cooperation with the state in implementing standards and enforcing the Clean Air Act. We emphasize the importance of the EPA acting, not for the benefit of American Cyanamid, but for the benefit of the State of Louisiana which is by statute designated to play a significant cooperating role with the EPA.

Id. at 500.

The emphasis, then, is not upon whether Alcan is in compliance with the proposed KSIP revision. Rather, the primary issue is whether the EPA has acted responsibly to avoid a state of regulatory limbo such as exists in this instance. Due to its inaction on the proposed KSIP revision, the EPA may not bring an enforcement action against Alcan under the existing KSIP since Alcan has been operating in reliance upon assurances by the JCAPCD that its emissions are acceptable and in compliance with the proposed KSIP revision. The EPA may not seek to enforce the standards of the proposed KSIP revision since it has failed to take any final action on the proposal. This regulatory quandry is of EPA's own making.

Moreover, the dispute over whether Alcan is in compliance with the proposed KSIP revision is apparently between the EPA and JCAPCD. Alcan has been informed by the JCAPCD that its operation is in compliance. Whether the JCAPCD's assessment of compliance is inaccurate for any reason is an issue that must be resolved between the two regulatory agencies before any enforcement action may be brought against Alcan. Had the EPA definitively ruled on the proposed KSIP revision within the four (4) month period as required, then, at least, the standards for determining non-compliance would be clear and this action could proceed. However, until this is done, no enforcement action is appropriate. Accordingly, Alcan is entitled to summary judgment as a matter of law.

Therefore, because the further discovery sought by the EPA is essentially unnecessary to this action, EPA's motion under Rue 56(f), Fed. R. Civ. P., is denied. See 6-Pt. 2 Moore's Federal Practice ¶56.24, 56-1425, 1426 (2d Ed. 1987). Furthermore, after consideration of the pleadings filed herein and all admissible evidence of record, summary judgment in favor of Alcan is granted as a matter of law. In ruling on Alcan's motion, this Court expresses no opinion regarding the merits of any claims by the EPA that Alcan is operating in violation of the Clean Air Act.

Separate orders shall accompany this Memorandum Opinion.

This 15th day of March, 1988.

/s/ CHARLES R. SIMPSON, III
United States District Judge

cc: Counsel of Record

ORDER OF UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

(Dated March 15, 1988)

Civil Action No. 87-0434-L(CS)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALCAN FOIL PRODUCTS, Division of
Alcan Aluminum Corporation,
Defendant and Third-
Party Plaintiff,

vs.

ATLANTIC RICHFIELD COMPANY,
Third-Party Defendant.

ORDER

For the reasons stated in the Memorandum Opinion entered this date,

IT IS HEREBY ORDERED that EPA's motion to hold Alcan's motion for summary judgment in abeyance pending further discovery pursuant to Rule 56(f), Fed. R. Civ. P., is DENIED.

This 15th day of March, 1988.

/s/ CHARLES R. SIMPSON, III
United States District Judge

cc: Counsel of Record

ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

(Dated March 15, 1988)

Civil Action No. 87-0434-L(CS)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALCAN FOIL PRODUCTS, Division of
Alcan Aluminum Corporation,
Defendant and Third-Party Plaintiff,

vs.

ATLANTIC RICHFIELD COMPANY,
Third-Party Defendant.

ORDER

For the reasons stated in the Memorandum Opinion entered this date,

IT IS HEREBY ORDERED that Alcan's motion for summary judgment in its favor pursuant to Rule 56, Fed. R. Civ. P., is GRANTED, and this action shall be remanded from this Court's docket by the Clerk of the Court.

There being no just reason for delay in its entry, this is a final order.

This 15th day of March, 1988.

/s/ CHARLES R. SIMPSON, III
United States District Judge

cc: Counsel of Record

MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

(Dated September 15, 1988)

Civil Action No. 87-0434-L(CS)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
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UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALCAN FOIL PRODUCTS DIVISION
OF ALCAN ALUMINUM CORPORATION,
Defendant and Third-Party Plaintiff,

vs.

ATLANTIC RICHFIELD COMPANY,
Third-Party Defendant.

MEMORANDUM OPINION

This matter is before the Court on the motion of the United States Environmental Protection Agency ("EPA") for reconsideration of this Court's prior summary judgment ruling. By order dated March 15, 1988, this Court granted summary judgment in favor of defendant, Alcan Foil Products Division of Alcan Aluminum Corporation ("Alcan"), dismissing the EPA's complaint seeking penalties and injunctive relief for

Alcan's alleged violation of the Clean Air Act, 42 U.S.C. §§7401 et seq. The pertinent facts have already been fully set forth and will not be repeated here.

The Court has considered the authorities submitted in support of and in opposition to the EPA's motion for reconsideration. The Court has given special scrutiny to *United States vs. National Steel Corporation*, 767 F.2d 1176 (6th Cir. 1985), and, as explained herein, concludes that *National Steel* does not require that this Court vacate its previous order granting summary judgment in Alcan's favor.

In *National Steel*, the EPA sued National Steel for violation of the Federal Clean Air Act. In resolution of that action, as part of a consent decree, National Steel agreed to begin, by August 1, 1981, installation of pollution-control equipment on a furnace at one of its facilities. The consent decree imposed penalties for noncompliance, but permitted National Steel to seek alternative emission reduction options. National Steel sought such an option by seeking a "bubble" plan for the facility at which the offending furnace was located. The consent decree expressly provided that application for a "bubble" would *not* excuse delay in complying with the consent decree deadline. *Id.* at 1179. Apparently in hopes that the bubble would be approved, National Steel did not begin installing the pollution-control equipment the consent decree required. After some delays and extensions of time, on December 10, 1982, the EPA approved the proposed bubble. However, during public comment, the bubble was shown to violate air quality standards. On March 30, 1983, the EPA advised National Steel that it would not grant final approval. In April, 1983, the Justice Department sought enforcement of the consent decree, the requirements of which National Steel had hoped to avoid by submission of the bubble.

As its defense to the consent-decree enforcement action, National Steel argued that "mixed signals" from the EPA and the EPA's delay in approving the bubble had induced National Steel to forego installation of the required emission control equipment. As a result, argued National Steel, it should not be subject to penalties for failure to comply with the terms of the consent decree. The Sixth Circuit disagreed, reasoning that National Steel had merely lost its gamble that the bubble would be approved. The Sixth Circuit upheld the award of consent-decree penalties against National Steel, subject to a 180-day limitation contained in the consent decree. The Sixth Circuit expressly rejected National Steel's argument that failure of the EPA to approve or disapprove of the bubble without four months of submission excused it from the consent-decree penalties. In rejecting that argument, the Sixth Circuit stated in cursory fashion that the four-month rule applicable to approval of general state plans is not applicable to revisions of state plans. 767 F.2d at 1183, n. 1.

While the *National Steel* footnote suggests that the Clean Air Act does not require the EPA to act on proposed SIP revisions within four months, *National Steel* does not require this Court to reverse its previous summary judgment ruling. First, the consent decree in *National Steel* expressly provided its requirements would not be excused by submission of a bubble proposal; therefore, the question of the proposed bubble's effect on a SIP's enforceability was not before the Court. Accordingly, the footnote is mere dictum. Second, even if the four-month rule does not apply to submitted SIP revisions, the real issue is whether the EPA should be allowed to bring enforcement proceedings against a polluter who has complied with its state's proposed SIP revision, which the EPA may yet approve, but on which the EPA has neglected to act.

For guidance on this issue, this Court has considered the seminal case of *Train vs. National Resources Defense Counsel*, 421 U.S. 60, 95 S.Ct. 1470, 14 L.Ed.2d 731 (1975). *Train*, like *National Steel*, does not specifically address the issue of the judicial "limbo" created when a state submits a SIP revision and the EPA takes no action on it. However, *Train* makes it very clear that the primary rule-making role for Clean Air Act standards is allocated to the States, not to the EPA.

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under §110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a)(2). . . . Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.
>
> . . . [T]he third paragraph of §110(a), and the one immediately following the paragraphs which specify that States shall file implementation plans and that the Agency shall approve them if they satisfy certain broad criteria, is the section which *requires* the Agency to "approve any revision of an implementation plan" if it "determines that it meets the requirements" of §110(a)(2). . . . [T]his provision

> applies to *any* revision, . . . Agency approval is subject only to the condition that the revised plan satisfy the general requirements applicable to original implementation plans. Far from evincing congressional intent that the Agency assume control of a State's emission limitations mix once its initial plan is approved, the revision section is to all appearances the mechanism by which the States may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards.

Train at 79-80 (footnotes omitted).

Allocating to the EPA secondary responsibility recognizes the state's interest in protecting its own citizens, both from air pollution and from unnecessary or unduly restrictive regulations on the operation of its industry and business. The EPA's interest is merely in determining whether the state's regulatory scheme furthers the overall purpose and plan of the Clean Air Act. Delay on the part of the EPA in making that determination should not hamper the state's right and duty to regulate and protect its own citizens as it sees fit. *Accord United States vs. General Motors Corp.*, No. 87-2068-MC (D.Mass. May 16, 1988).

In an effort to balance the state's interest against the EPA's, appellate courts in three federal circuits have concluded that the EPA is required to act on SIP revisions within four months of submission. *See generally, American Cyanamid vs. U. S. EPA*, 810 F.2d 493 (5th Cir. 1987); *Duquesne Light Co. vs. EPA*, 698 F.2d 456 (D.C. Cir. 1983); *Council of Commuter Organizations vs. Gorsuch*, 683 F.2d 648, 651-52 (2nd Cir. 1982) ("CCO #I"). These decisions implicitly recognize the unfairness of imposing penalties on a polluter who

complies with a state-proposed SIP revision that the EPA may ultimately approve, because it adequately provides for attainment and maintenance of national air quality standards. To mitigate that unfairness, *American Cyanamid* concluded that the EPA's failure to act on proposed revisions within four months precludes enforcement actions until the EPA rejects the proposed revision; *Duquesne* prohibited the collection of penalties until the EPA rejects the revision; the *Gorsuch* Court expressed concern that it took the EPA years to approve SIP revisions which were supposed to be effective in 1978, *Council of Commuter Organizations vs. Thomas*, 799 F.2d 879, 888 (2nd Cir. 1986) ("CCO #II").

The unfairness that concerned the Second, Fifth and District of Columbia Circuits, as well as this Court, is ameliorated by simply requiring that the EPA rule on submitted SIP revisions before it begins enforcement proceedings against polluters to which the revisions are applicable. If the EPA approves the revision as meeting the requirements of the original SIP, then compliance with the revision during the pendency of that approval will have furthered the goals of the Clean Air Act, and the question of penalties and enforcement proceedings rightfully becomes moot.

If the EPA rejects the revision, those aggrieved will be entitled to seek judicial review of the EPA's action. In the meantime, the EPA would apparently be free to bring enforcement proceedings for violation of the

unrevised SIP.[1] How penalties should be assessed for noncompliance with the approved revision or with the original SIP, if the revision is rejected, is not ripe for decision until the EPA acts on the proposed revision, thereby establishing its right to bring enforcement proceedings. Once that right is established, and it is determined whether revised or unrevised SIP guidelines apply, then the Court can address the question of whether penalties should be imposed for the period the SIP revision stood submitted for approval. That answer ought to depend on the equities of each individual case.

Barring enforcement proceedings while the EPA considers a proposed SIP revision comports with Congressional intent that the EPA defer to the state's wisdom in deciding how best to achieve the goals of the Clean Air Act. It also encourages the EPA to rule promptly on revisions submitted to it. Judicial review of any rejection by the EPA will assure that prompt action by the EPA is not hasty or unfounded. *C.f. American Cyanamid* at 499 (recognizing that the *Duquesne* approach of allowance of retroactive penalties may encourage the EPA to reject revisions it should approve). Similarly, if the proposed revision fails to meet the necessary requirements for approval, the risk that "retroactive" penalties might be imposed would discourage polluters from petitioning for revisions which

[1] *Train* recognizes that right: "Should either [the state or the EPA] determine that granting the variance [under the revision authority of §110(a)(3)] would prevent attainment or maintenance of national air standards, the polluter is presumably within his rights in seeking judicial review." *Train*, 421 U.S. at 92. This litigaton would be on the "polluter's time, not the public's", for during the pendency of the litigation "the original regulations remain in effect . . ." *Id.* Implicit in *Train's* logic is the presumption that the EPA will *act* on revision proposals; not even *Train* suggests that the Clean Air Act confers on the EPA power to exercise "pocket vetoes" over state-proposed revisions, by simply failing to take action on them.

are not good faith efforts to comply with the standards of the Clean Air Act. *C.f. Duquesne* at 472 (polluter could be liable for penalties calculated back to the approval deadline, with interest).

Finally, the EPA argues that "noncomplying sources" who escape penalties or avoid enforcement proceedings because of pending SIP revisions gain "an unfair advantage over those that seek to comply" with the unrevised SIP. This argument disregards the fact that a SIP revision which protects a particular polluter is promulgated by the state, not by the private polluter itself. Unless the state concludes that the revision is warranted, in the interest of the public it serves, the revision will not be submitted to the EPA for approval to begin with. Penalizing those who comply with what a state deems reasonable air-pollution control guidelines is contrary to the spirit and intent of the Clean Air Act, and to the allocation of responsibility the Act contemplates.

The EPA urges this Court to reconsider its refusal to hold its decision on Alcan's summary judgment motion in abeyance under Fed. R. Civ. P. 56(f). The EPA claims it has been unable to get affidavits concerning Alcan's alleged violation of the revised SIP guidelines. However, the present action is not based on noncompliance with the *revised* SIP. Accordingly, affidavits concerning any revised SIP noncompliance are immaterial to the present action, and cannot contain facts essential to justify defendant's opposition to Alcan's motion for summary judgment. Fed. R. Civ. P. 56(f).

For the foregoing reasons, by separate order this Court reaffirms and reiterates its order of March 15, 1988, granting summary judgment in favor of Alcan.

This 15th day of September, 1988.

/s/ CHARLES R. SIMPSON, III
United States District Judge

cc: Counsel of Record

ORDER OF UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

(Dated September 15, 1988)

Civil Action No. 87-0434-L(CS)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALCAN FOIL PRODUCTS DIVISION OF
ALCAN ALUMINUM CORPORATION,
Defendant and Third-
Party Plaintiff,

vs.

ATLANTIC RICHFIELD COMPANY,
Third-Party Defendant.

ORDER

This Court having reconsidered its previous orders granting summary judgment in defendant's favor and denying plaintiff's motion for a continuance, IT IS HEREBY ORDERED that the motion by Alcan Foil Products Division of Alcan Aluminum Corporation ("Alcan") for summary judgment in its favor, pursuant to Rule 56, Fed. R. Civ. P., is GRANTED, and this action shall be REMANDED from the Court's docket by the Clerk of the Court.

Further, inasmuch as the EPA's complaint against Alcan has been dismissed, and Alcan's third-party complaint against third-party defendant, Atlantic Richfield Company, is for indemnification of Alcan as against the EPA's claims, IT IS HEREBY FURTHER ORDERED that Alcan's third-party complaint is hereby DISMISSED WITHOUT PREJUDICE, and this action shall be removed from this Court's docket without further order.

This 15th day of September, 1988.

/s/ CHARLES R. SIMPSON, III
United States District Judge

cc: Counsel of Record

42 U.S.C. Sec. 7410(a)(2)(3)(1982)

IMPLEMENTATON PLANS

Sec. 110. (a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submissions of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (1), (i), in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (c)) in no case later than three years from the date of approval of such plan

(or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph(D).

[PL 95-95, August 7, 1977]

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

[PL 95-95, August 7, 1977]

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (i) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard or (ii) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 126, relating to interstate pollution abatement;

[PL 95-95, August 7, 1977]

(F) it provides (i) necessary assurances that the State will be adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this act, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under Section 128;

[PL 95-95, August 7, 1977]

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearings of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) except as provided in paragraph (3) (C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977; and

[PL 95-95, August 7, 1977]

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 171 (2) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D (relating to nonattainment areas);

[PL 95-95, August 7, 1977]

(J) it meets the requirements of section 121 (relating to consultation), section 127 (relating to public notification), part C (relating to prevention of significant deterioration of air quality and visibility protection); and

[PL 95-95, August 7, 1977]

(K) it requires the owner or operator or each major stationary source to pay to the permitting authority as a condition of any permit required under this Act a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after the date of enactment of this subparagraph, the reasonable costs (incurred after such date of enactment) of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action).

[PL 95-95, August 7, 1977]

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supply fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c), shall be required to revise an applicable implementation plan because one or more exemptions under section 113 (relating to Federal facilities), enforcement orders under section 113(d), suspensions under section 110(f) or (g) (relating to temporary energy or economic authority), orders under section 119 (relating to primary nonferrous (illegible), or extensions of compliance in decrees entered under section 113(a) (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

[PL 95-95, August 7, 1977; amended by PL 97-23]

(D) Any applicable implementation plan for which an attainment date later than December 31, 1982, is provided pursuant to section 172(a)(2) shall be revised by July 1, 1979, to include the comprehensive measures and requirements referred to in subsection (c)(5)(B).

[PL 95-190, November 16, 1977]

MOTION FILED IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

(Dated December 11, 1989)

No. 88-6300

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellant,

v.

ALCAN FOIL PRODUCTS DIVISION OF ALCAN ALUMINUM CORPORATION,
Defendant/Appellee,

ATLANTIC RICHFIELD COMPANY,
Third-Party Defendant.

MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

ALCAN FOIL PRODUCTS ("Alcan") through their undersigned attorneys, and pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, respectfully moves for a stay of the issuance of the mandate herein for a period of thirty days to enable appellees to prepare and file a petition for writ of certiorari with the United States Supreme Court. In support of this motion appellees state the following:

1. On November 21, 1989, this Court entered judgment in the above-captioned case reversing in part an order of dismissal by the District Court and remanding the case for further proceedings to determine the merits.

2. Appellees will be filing a petition with the United States Supreme Court for a writ of certiorari. Since the issues to be raised therein relate to plaintiffs' right to litigate the merits of the controversy, a Supreme Court ruling in Alcan's favor would render moot any litigation of or decision on the merits. Moreover, the United States Supreme Court has recently granted certiorari in *United States v. General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989) and the outcome in that case will undoubtedly apply to this case. Under such circumstances, further proceedings in the District Court at this time would result in a waste of judicial resources and unnecessary demands on the parties to the two lawsuits. Such proceedings should therefore be held in abeyance pending the filing of the petition for writ of certiorari and its disposition by the Supreme Court.

3. Appellees believe there is a strong possibility that the United States Supreme Court will issue a writ of certiorari. As this Court is aware, its decision relied heavily on the reasoning of the First Circuit in *United States vs. General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989). Alcan has been informed that the Supreme Court granted certiorari after being informed of the decision by this Circuit in this case. Alcan believes that the facts in this case would present the Supreme Court with a more comprehensive understanding of the functioning of the Clean Air Act, and the potential disruptive impact of the EPA's failure to act on SIP revisions in a timely fashion on the rational conduct of business, than would

consideration of the *General Motors* case alone. In addition, it would re-establish the original order of these cases. The decision of the District Court in *General Motors* relied heavily on the prior holding of the District Court in this case. However, the government elected to file a motion for reconsideration with the District Court only in this case which resulted in the *General Motors* case preceding this case to the appellate level. Alcan believes this fact is especially significant in light of the concurring opinion which clearly points out the unwillingness of this Court to adopt the First Circuit opinion *in toto*. Alcan will ask the Supreme Court to grant its petition for four reasons:

1. This case presents a factual scenario that should be considered with General Motors.

2. This decision further adds to the conflict between the Circuits.

3. This case presents major issues of federalism, comity and the implementation of the Clean Air Act.

4. The issues presented involve important, recurring questions concerning the enforcement under the Clean Air Act.

WHEREFORE, appellees request that the issuance of the mandate in this case be stayed for a period of thirty days to afford appellees the necessary time for preparing and filing said petition for writ of certiorari.

Dated: December 11, 1989

Respectfully submitted,

/s/ LAWRENCE A. SALIBRA, II

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Attorney for Defendant/Appellee

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Motion for Stay of Mandate Pending Petition for Writ of Certiorari have been served upon counsel via Federal Express courier service, postage prepaid, properly addressed, this 11th day of December, 1989, to the following:

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